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In The

Supreme Court of the United States

October Term, 1990

JOHN W. DENNISON,

Petitioner,

v.

COUNTY OF FREDERICK, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Petitioner state a claim for violation of his First Amendment rights where he alleged he was constructively discharged for a generalized course of conduct and did not identify any particular speech, symbolic or otherwise, for which he was punished?

2. Was Petitioner's general performance of his duties as Building Official a matter of public concern or simply a private matter between him and his employer?

3. Did Plaintiff state a claim for denial of procedural due process where he voluntarily spurned access to the County's grievance procedure by resigning his employment?

4. Did Plaintiff receive adequate procedural due process where he received an eleven-day administrative hearing in which he was represented by counsel and could call witnesses, as well as cross examine witnesses?

5. Were Petitioner's claims for deprivation of constitutionally protected rights barred where the state court had already determined that he voluntarily resigned his employment and was not constructively discharged?

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RESPONDENTS' BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner John W. Dennison resigned his position as Building Official of the County of Frederick, Virginia in September of 1986. Since then, he has dragged his case through the County's grievance procedure, the state Circuit Court, the Supreme Court of Virginia, the United States District Court for the Western District of Virginia, the Court of Appeals for the Fourth Circuit, and now seeks review by this Court. This case presents no issues appropriate for review, and Respondents pray that his Petition for Writ of Certiorari be denied.

OPINIONS AND ORDERS BELOW

Respondents accept Petitioner's statement of the applicable opinions and orders below.

JURISDICTION

The Petitioner claims that jurisdiction lies under 28 U.S.C. § 1254(1). However, Petitioner has failed to identify any of the grounds for which Certiorari may be granted, as set forth in Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

On September 30, 1986, the Frederick County Administrator, John Riley, and the County Planning Director, Bob Watkins, met with Dennison to advise him that certain improvements were needed in his job performance. Riley and Watkins had prepared an interim performance evaluation which they planned to review with him. This evaluation was advisory in nature and would not in any way have affected Dennison's salary, benefits or working conditions. Riley advised Dennison that he would be on probation for the following six months. Riley also explained that in the interim, Dennison would meet with Riley and Watkins at sixty-day intervals to monitor his progress.

At that time, and without review of either the evaluation or the proposed corrective measures, Dennison stated that he resigned. Ten days later, after consulting an attorney, Dennison submitted a written resignation.

On October 20, 1986, Dennison filed a grievance under Frederick County's grievance procedure for County employees alleging his resignation had been "involuntary". When a question was raised whether Dennison's resignation was grievable, Mr. Riley asked James Longerbeam, a resident and citizen of Frederick County and a member of the County's Employee Relations Committee, to investigate Dennison's claims. He held eleven days of hearings at which Dennison called witnesses, cross examined witnesses and was represented by counsel. Mr. Longerbeam determined that the facts and circumstances surrounding Dennison's resignation did not constitute an involuntary resignation, and the County Administrator adopted his findings, ruling the resignation non-grievable.

Dennison appealed the County Administrator's decision to the Frederick County Circuit Court, which held that Dennison did not prove the two elements necessary to establish a constructive discharge: deliberateness of the employer's action and intolerability of the working conditions, citing *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). *See* Petitioner's Appendix at 55-58. Dennison attempted a collateral attack on this decision by alleging that the Circuit Court was biased against him. This attempt was rejected by the Circuit Court, and the Virginia Supreme Court denied Dennison's Petition for Appeal.

While the state court action was pending, Dennison filed this federal court action alleging denial of rights under the first and fourteenth amendments to the United States Constitution. Following discovery, the County moved for summary judgment. When the Circuit Court

ruled on Dennison's state claims, the County filed the decision with the District Court and submitted that collateral estoppel made summary judgment appropriate for that reason as well.

The District Court requested a review of the Circuit Court file to confirm that the proceedings in that court involved factual issues identical to those in the federal action. On December 1, 1989, the District Court granted the County's Motion to Dismiss And/Or For Summary Judgment. *See* Petitioner's Appendix at 25-42. The District Court determined that the state court had applied the *Bristow* standard in reaching its determination of the involuntary resignation question. Therefore, the District Court held:

> An essential element of plaintiff's claim having been decided adversely to him in a proceeding before the Circuit Court for the County of Frederick, and that decision being final and unreviewable, that issue is now *res judicata*. Therefore, summary judgment for the defendants in the present action, as to plaintiff's federal claims, is appropriate.

See Petitioner's Appendix at 39.

The United States Court of Appeals for the Fourth District affirmed the District Court's decision, but on alternate grounds. It determined that it need not decide whether collateral estoppel was appropriate because Plaintiff failed to state a claim under the First or Fourteenth Amendments.

First, the Court of Appeals reviewed the speech and conduct Dennison alleged were the basis for his constructive discharge and determined:

> At most, the present case involves a dispute over a general course of conduct, not the expression of any idea or opinion. Dennison never evinced an "intent to convey a particularized message . . . . " *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Since Dennison cannot identify any particular speech, symbolic or otherwise, for which he was punished, we hold that, as a matter of law, his First Amendment right to freedom of speech could not have been violated.

See Petitioner's Appendix at 14-15.

Second, the Court of Appeals held that urgings by Dennison's supervisors for a less strict enforcement of the State Building Code, when taken in context, were essentially a private matter between him and the County, and not of public concern. Therefore, his alleged "speech" was not protected under the First Amendment. *See* Petitioner's Appendix at 19.

With respect to Dennison's due process claims, the Court of Appeals again did not address whether Dennison was constructively discharged, but instead held that he received adequate process and spurned further post "termination" process by resigning and waiving his rights under the County's grievance procedure. *See* Petitioner's Appendix at 21-22. On these bases, the Court of Appeals upheld the District Court's judgment in favor of the County.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari does not even allege that this case satisfies the criteria specified in Rule

10 for review by this Court. There is no allegation that the Court of Appeals' decision is in conflict with the decision of any other court. Nor does the Petition identify any important question of law which has not been, but which should be, settled by this Court. Instead, the Petition reveals that Dennison is simply dissatisfied with the decisions reached by the state Circuit Court, the Virginia Supreme Court, the District Court and the Court of Appeals for the Fourth Circuit. The decisions of these courts were correct and need not be reviewed by this Court.

I. The Court Should Deny The Petition Since the Petitioner Alleged He Was Constructively Discharged Because Of A Generalized Course Of Conduct And Did Not Identify Any Speech, Symbolic Or Otherwise, For Which He Was Punished.

Petitioner concedes that to state a claim under the First Amendment, he must identify speech protected by the First Amendment and establish that this speech was a motivating factor in his discharge. *See Rankin v. McPherson*, 483 U.S. 378 (1987), *reh. denied*, 483 U.S. 1056 (1987). Here, there was no discharge, and the Court of Appeals found that Dennison failed to identify any protected speech. Petitioner's Appendix at 15.

When asked in depositions to identify any particular speech he alleged to have been a motivating factor in his "discharge", or which he believed to be protected by the First Amendment, Dennison could not do so. Indeed, his counsel admitted this in deposition: "Mr. Schultz: . . . I think he has stated that his conduct in enforcing the Building Code was the motivation behind the creation of

the circumstances, particularly the placing on probation that caused him to resign." When pressed to identify any particularized speech, Dennison was instructed not to answer by his counsel. Even in his briefs to the Court of Appeals, Dennison continued to argue, not that any particular speech motivated his "constructive discharge", but simply that the County did not like the way in which he did his job. Petitioner's Appendix at 13-14.

In his Petition, Dennison again reaffirms his allegation that it was merely his course of conduct of "properly but thoroughly enforcing the Building Code of the State of Virginia" that led to his constructive discharge. Petition at 31-33. He tries to bolster his position by pointing to specific incidents where he properly enforced the Building Code. However, these are simply examples of his "course of conduct" in doing his job as the Building Official, not particularized speech intended "to convey a particularized message." *See Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

Petitioner's allegations are insufficient to state a claim under the First Amendment. For example, in *Berry v. Bailey*, 726 F.2d 670 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985), the Eleventh Circuit Court of Appeals found no First Amendment violation in a sheriff's discharge of a deputy "for doing a good job," even when the "good job" involved refusal to conform to corrupt practices in the Sheriff's Department. Quoting with approval from the trial court opinion, the Court stated:

> 'While the Court agrees that termination [for properly doing one's job] can be unjust', it does not implicate a First Amendment right.

Id. at 675.

Because Dennison could not present evidence of any protected speech, dismissal of his First Amendment claim was clearly appropriate. Moreover, this issue concerns only the specific facts of this case and presents no reason for review by this Court.

II. The Petition Should Be Denied Because The "Speech" Alleged By Dennison To Be The Motivating Factor In His Constructive Discharge Did Not Involve Matters Of Public Concern.

The Court of Appeals found, as an alternative reason for dismissal of Petitioner's First Amendment claims, that the alleged retaliation for Dennison's enforcement of the Building Code, taken in context, was essentially a private matter between him and the County, not retaliation for speech involving a matter of public concern. Petitioner's Appendix at 19.

In his Petition, Dennison argues that "the 'public interest' is extricably involved in all 'speech' which relates to the strict but proper enforcement of the Building Code." Petitioner's Appendix at 51-52. The essence of Petitioner's argument is that all speech related to his job as Building Official would be of public interest. Although the Building Official certainly performs an important function, as do policemen, firemen, county managers, and other public officials, the effect of Petitioner's argument would be to constitutionalize all aspects of these employees' job performance. This is not, and should not be, the law. The Court of Appeals properly found no First Amendment right to be implicated by Petitioner's allegations. Again, this issue presents no conflict in the law and

turns only on the facts of this case, presenting no reason for review.

III. The Petition Should Be Denied Because Petitioner Has Received More Process Than Required By The Fourteenth Amendment.

Even if this Court were to view Dennison's resignation as a constructive discharge, the Court of Appeals properly found that he had extensive review of his claims – more process than he was due under the Fourteenth Amendment – and that he had spurned additional review by resigning. Petitioner's Appendix at 20-23.

It is undisputed that Dennison received extensive due process. Dennison was notified of the plan to re-evaluate him and place him on probation in a face-to-face meeting with Mr. Riley and Dennison's direct supervisor, Mr. Watkins. Mr. Riley began to explain the reasons for the decision to re-evaluate him, but Dennison instead chose to resign without hearing the details of the decision and without taking the opportunity to respond.

Even if Dennison's resignation is viewed as a termination, the Court of Appeals properly found that this meeting with Riley and Watkins more than satisfied any requirements of a pre-termination hearing. A pre-termination hearing need not be elaborate and must simply provide the employee with notice of the charges against him and an opportunity to respond, either in writing or in person. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Dennison argues in his Petition that his evaluation and probation were completed before this meeting. Petition at 55. However, the evaluation and probation did not deprive him of his property interest. If any deprivation occurred, it occurred when Dennison resigned. Clearly the meeting with Riley and Watkins had occurred before the resignation.

With respect to post-termination due process, Petitioner does not dispute that the grievance procedure for Virginia's public employees, upon which the County's procedure is modeled, satisfies the requirements of due process. *See Detweiler v. Commonwealth of Virginia Dept. of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983). Moreover, Petitioner does dispute that he spurned this grievance procedure in favor of resignation and only attempted to invoke that procedure after he resigned. He also does not dispute that he had eleven days of hearings on his complaints, that he was represented by counsel, and that his counsel called witnesses and cross-examined the County's witnesses at length.

Petitioner's only argument about the process he received was that the final step of the state mandated grievance procedure is heard by a three-member panel chosen by the participants from a panel of five selected by the County. Petition at 56. He makes no allegations of actual bias on the part of any panel. Indeed he could not do so because he resigned before ever participating in a panel hearing. Furthermore, administrative decision makers, like judicial ones, are entitled to a "presumption of honesty and integrity," *see Withrow v. Larkin*, 421 U.S.

35, 47 (1975), and absent a showing of actual bias stemming from an extrajudicial source, they are not constitutionally precluded from participating in a grievance procedure. *See Hortonville Jt. Sch. Dist. No. 1 v. Hortonville Education Association*, 426 U.S. 482, 496-97 (1976). Indeed, there was no requirement of review by this panel after Dennison had already received an eleven-day hearing before Mr. Longerbeam. This is a well established legal proposition, and there is no reason for review by this Court.

IV. The Petition Should Be Denied Because The District Court Correctly Precluded Relitigation Of Dennison's Constructive Discharge Claim.

To prevail on any of his federal claims, Petitioner first had to establish that his resignation was involuntary and that he was actually the victim of a "constructive discharge." In *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), the Fourth Circuit held:

> A constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job . . . *a plaintiff alleging constructive discharge must . . . prove two elements: deliberateness of the employer's action and intolerability of the working conditions.*

Id. at 1255 (emphasis added).

The state Circuit Court applied precisely this standard, citing *Bristow*, and found:

> Mr. Dennison has not established a probability that the County intended to cause his resignation, or that the circumstances of his employment were intolerable. Therefore, Mr. Dennison has not established the elements of constructive discharge or involuntary resignation.

See Petitioner's Appendix at 51.

The state court's determination that there was no "constructive discharge" collaterally estopped Dennison from relitigating that issue in the District Court. In *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), this Court held that if a plaintiff asserts a claim under 42 U.S.C. § 1983, and also litigates the same issue in state court, the state court judgment may decide the federal claim:

> It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.

Id. at 81. Section 1983 does not create an exception to this rule. *Id.* at 84. Applying Virginia law, the Court in *Hozie v. Preston*, 493 F. Supp. 42, 44 (W.D. Va. 1980) held:

> Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action. In the subsequent action, the parties to the first action and their privies are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action.

Dennison has already fully litigated the constructive discharge issue in the state Circuit Court. He has had his

day in court and lost. To prevail in federal court, Dennison would have had to persuade the District Court to reach a different determination than that reached by the Circuit Court when the evidence before both courts was identical. Because the state and federal actions involved the same parties and the same claims, the District Court properly gave full faith and credit to the state court decision and precluded further litigation of the issue.

Petitioner asserts that because the state Circuit Court decision was not directly appealable, collateral estoppel should not be applied. He argues that this Court should adopt the Restatement (Second) of Judgments § 28(1), and require that a decision be appealable for it to be given preclusive effect in subsequent litigation. However, no Virginia court has ever adopted this provision of the Restatement. Dennison has shown no compelling reason for this Court to adopt the Restatement approach where the state courts of Virginia have not, and to do so would be contrary to law and policy. Furthermore, as this Court stated in *Standefer v. United States*, "[t]his is not to suggest that the availability of appellate review is always an essential predicate of estoppel. *See Johnson Co. v. Wharton*, 152 U.S. 252 (1894); see generally IB J. Moore & T. Currier, Moore's Federal Practice ¶ 0.416 [5] (2d ed. 1974)." 447 U.S. 10, 23 n.18 (1980). This Court should give the same full faith and credit to the state court decision as the state itself would. Therefore, because Dennison could not establish a constructive discharge, dismissal of his federal claims was appropriate. Furthermore, the decision whether to apply estoppel turns on the facts of each case, and this issue presents no reason for review by this Court.

CONCLUSION

The issues presented by the Petitioner involve neither a substantial federal question nor a split among the circuits. Therefore, Respondents pray that Certiorari be denied.

Respectfully submitted,

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